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Supreme Court, U.S.
FILED

021395 MAR 19 2003

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No. 02-

IN THE

Supreme Court of the United States

WALTER A. CHRUBY,

Petitioner,

v.

FRANK GILLIS, SUPERINTENDENT,
SCI COAL TOWNSHIP,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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March 19, 2002

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QUESTIONS PRESENTED

1. Whether petitioner's counsel's performance – which included breaking a repeated promise made in a delayed opening statement to present petitioner's testimony and conceding petitioner's guilt of a charged crime – was so deficient that prejudice should have been presumed and ineffective assistance found?

2. Whether petitioner's probation officer, who was acting as an agent for police investigating a murder, was required to advise petitioner of his *Miranda* rights prior to interrogating him on behalf of those police who were waiting nearby to arrest him pursuant to a warrant on an unrelated charge?

PARTIES TO THE PROCEEDING

All parties to the proceeding below are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Walter A. Chruby, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) was entered on November 29, 2002, and is not reported. The order denying Petitioner's petition for rehearing en banc (App. 25a-26a) was entered on January 13, 2003 and is not reported. The opinion of the United States District Court for the Middle District of Pennsylvania denying petitioner's petition for a writ of habeas corpus (App. 13a-24a) was entered on June 11, 2001, and is not reported.

JURISDICTION

The court of appeals entered its opinion on November 29, 2002. Petitioner timely filed a petition for rehearing en banc which was denied January 13, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall [any person] be compelled in any criminal case to be a witness against himself.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), see 28 U.S.C. § 2254, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

This case arises from the Third Circuit Court of Appeals' denial of Petitioner's petition for a writ of habeas corpus. In the court of appeals, Petitioner challenged the constitutionality of his state court conviction of first-degree murder and related crimes on two grounds: First, he asserted that at his trial for capital murder, his counsel's performance was so profoundly deficient that prejudice should have been presumed and, in the alternative, that he had in fact been prejudiced. Second, he claimed that his probation officer, who was acting as an agent for the police, was required to advise him of his *Miranda* rights prior to interrogating him on

behalf of the police officers waiting in the next room to execute a warrant for his arrest. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The district court denied the petition and refused to issue a certificate of appealability. The Third Circuit granted the certificate of appealability, but ultimately denied the petition. Petitioner seeks review of that decision in this Court because the decision below (a) contravenes this Court's decisions concerning the presumption of prejudice arising from certain kinds of ineffective assistance of counsel and concerning the legal standards to be used in determining actual prejudice, and (b) unreasonably extends this Court's decision in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), far beyond its intended scope and in so doing subverts *Miranda*.

1. The prosecution at issue arose from the murder of Ruth Fergus in September 1995. Petitioner became a suspect pursuant to a confidential tip. Tr. of Trial at 17-18 (June 16, 1997). The police investigating the murder discovered that Petitioner had been recently released from prison, that he was on parole, and that he was wanted for passing a bad check of $17 some months before, prior to his imprisonment. *Id.* at 212.

On September 6, 1995, the police therefore contacted Petitioner's parole officer, Parole Officer Fox, who was employed in the Harrisburg, Pennsylvania parole office and who had been assigned to supervise Petitioner upon his release from prison. App. at 3a. On September 7, the police officers came to the parole officer's office, and "told him that [Petitioner] was a suspect in a homicide investigation but that they did not have enough evidence to charge him." *Id.* Specifically, the police informed the parole officer that Petitioner was a suspect in the murder of Ruth Fergus and that they had a warrant for his arrest on a bad check charge; and they requested the parole officer's assistance. *Id.*

The police officers requested that the parole officer question Petitioner when he reported for his parole interview on matters related to the investigation (*i.e.*, how he had

traveled to his interview, where he was staying, where his vehicle was parked, and where he had been during the previous days, App. at 3a) and report to the police what was learned. See *id.* ("[a]ccording to Fox, the police asked him to interrogate [Petitioner] about matters related to their criminal investigation, such as where he had been presently staying, where he had been for the past couple of days, where the car was, and how he got to the appointment in Harrisburg from State College"). The police also asked Officer Fox to take a photograph of Petitioner. *Id.* at 8a. They intended to glean what information they could from the parole officer's questioning and then arrest Petitioner based on the outstanding warrant on the bad check charge. *Id.* at 3a. Execution of the outstanding arrest warrant was to be used to further a wholly separate murder investigation. Officer Fox agreed to act as a police agent.

In a post-sentence motion hearing, Petitioner testified that "he was frisked when he entered the federal building [for his parole interview] and that he was frisked as soon as he entered Fox's office." App. at 8a. In addition, when Petitioner reported for the meeting, the police observed his entry through the lobby and then stationed themselves in the room across the hall from the parole office. Petitioner testified that he saw the officers and "thought they were there to talk to him about the car he had stolen." *Id.* When the interview commenced, Officer Fox asked Petitioner, *inter alia*, questions regarding where he had parked, and how he had gotten to the office. Petitioner said that he had parked in the Walnut Street Garage across from the federal building, but also said that a friend named "Dave" had driven him to the meeting. *Id.* at 3a. Then, they discussed supervised parole and Petitioner's pending arrest warrant. *Id.* at 3a-4a. At the conclusion of the meeting, the police arrested Petitioner on the warrant they obtained on the bad check allegation. *Id.* at 4a.

As Officer Fox reported the results of his questioning, the police searched Petitioner and found a car key and a parking receipt. When asked where he parked the car, Petitioner denied ownership of the car and said that he had been driven to the meeting by a friend. App. 4a, 20a. At this point, Petitioner still had not been read his *Miranda* rights. *Id.* at 20a. Using Petitioner's answers and these items, the police located Ruth Fergus' car in a nearby parking garage. The key found in Petitioner's pocket fit into the ignition. *Id.* at 4a. On October 4, 1995, the Commonwealth filed a criminal information against Petitioner charging him with, *inter alia*, the murder of Ruth Fergus.

In preparing for trial, Petitioner informed his counsel, Mr. Lysaght, that he was innocent and that he wanted to testify. Affidavit of Walter Chruby ¶¶ 3, 5, 7 (App. 27a-28a). He provided Mr. Lysaght with information about evidence that, if obtained, would have supported his timeline and alibi defense. *Id.* ¶¶ 2, 4 (App. 27a). Mr. Lysaght informed not only Petitioner, but his co-counsel, Ms. Stephanie Cooper, and members of Petitioner's family that he had taken numerous steps to prepare Petitioner's defense, including obtaining "all of the critical evidence/witnesses that were to support [Petitioner's testimony]." *Id.* ¶ 8 (App. 28a). Part of this purported preparation was subpoenaing a witness, David Nieves, who testified at Petitioner's preliminary hearing that he observed an individual not remotely matching Petitioner's description emerge from the motel room Petitioner had occupied with a bandage on his face and leave the premises in a white car. See Tr. of Prelim. Hr'g at 110-21 (Sept. 14, 1995). As Stephanie Cooper averred, "upon joining the defense, I met with attorney Gary Lysaght and had a detailed discussion regarding [Petitioner's] version of events on the day of the homicide, at which time Mr. Lysaght stated that he was planning to offer a timeline/alibi defense," and "Mr. Lysaght confirmed unequivocally to [Petitioner], members of his family, and co-counsel that he had obtained critical

evidence and witnesses that would support his testimony." Affidavit of Stephanie L. Cooper ¶¶ 2, 5 (App. 32a); Affidavit of Joseph Accordino, Jr. ¶¶ 4, 5 (App. 36a-37a). Mr. Lysaght's claims were later proven to be false, see *infra* at 8.

Petitioner was tried in the Centre County, Pennsylvania Court of Common Pleas. At trial, because there were no eyewitnesses to the murder, the Commonwealth presented a wholly circumstantial case. Petitioner's status as a parolee and the statements he made to Officer Fox were featured, as was the evidence discovered as a result of the interview. *Inter alia*, the Commonwealth established that Petitioner was in possession of items stolen from Ruth Fergus, including a credit card found in the car, App. 4a, 20a, evidence Petitioner intended to explain in his planned testimony. Chruby Aff. ¶¶ 10, 14, 28 (App. 28a, 29a, 31a). In addition, the Commonwealth presented evidence that Petitioner and the victim had met in 1995 and motel records indicating that a call was placed from Petitioner's room to the victim's residence on September 1, 1995, App. 11a, again evidence that Petitioner intended to dispute in his testimony.

The defense made a delayed opening statement to the jury after the Commonwealth had presented its case-in-chief.[1] Prior to that opening, Petitioner repeated to Mr. Lysaght his decision to testify. Chruby Aff. ¶ 10 (App. 28a). In his opening, Mr. Lysaght *four times* promised the jury that Petitioner would testify and provide his version of the events that took place. App. 4a. See also Cooper Aff. ¶ 9 (App. 33a). Counsel was aware that "[Petitioner] intended to explain to the jury that after finding the victim's car abandoned and unoccupied, he took it because he was in desperate need of transportation" and that "the victim's credit

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[1] Indeed, Mr. Lysaght informed Petitioner that he was making a delayed opening to "have the opportunity of hearing the Commonwealth's entire case against [Petitioner] before informing the jury that [he] would indeed testify." Chruby Aff. ¶ 9 (App. 28a).

card had been left inside the abandoned vehicle." *Id.* ¶¶ 7, 8 (App. 33a). Counsel was also aware that Petitioner intended to testify that he did not place a call to the victim's house. Accordino Aff. ¶ 5(a) (App. 37a). Moreover, Mr. Lysaght stated in the delayed opening that Petitioner was guilty of two of the charges against him, related to crimes he knew that Petitioner intended to testify that he did not commit. Specifically, although Petitioner had told Mr. Lysaght that he had "never used the victim's credit card nor . . . been charged with using anyone[']s credit card illegally," Chruby Aff. ¶ 14 (App. 29a), Mr. Lysaght nonetheless told the jury "that [Petitioner] used the victim's credit card and had stolen her car." App. 4a; Chruby Aff. ¶ 13 (App. 29a).

Mr. Lysaght, accordingly, knew that Petitioner intended to testify in a way that contradicted the Commonwealth's case. He did not, however, prepare Petitioner to testify, but instead threatened Petitioner by informing him after the delayed opening that he would get "the needle" – the death penalty – if he testified. App. 4a; Chruby Aff. ¶ 17 (App. 29a); Cooper Aff. ¶ 19, 23 (App. 34a-35a); Accordino Aff. ¶ 11 (App. 38a). In addition, Mr. Lysaght had placed Petitioner in the wholly untenable position of having to contradict his counsel by saying that he had not stolen the victim's card or of testifying to a crime he had informed counsel that he did not commit. Chruby Aff. ¶ 15 (App. 29a).

Moreover, although Mr. Lysaght had assured Petitioner's family and his co-counsel that he had taken many steps in preparation for trial and fully investigated Petitioner's alibi defense and supporting evidence, in fact, he had done nothing. See Cooper Aff. ¶ 10 (App. 33a) ("at the onset of the defense portion of the case, it became painfully apparent that Mr. Lysaght had prepared absolutely no defense whatsoever").[2] For example, Mr. Lysaght had stated that he

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[2] At this point, co-counsel suggested to Petitioner that she have an *ex parte* meeting with the trial judge to request a continuance so that

had phone records which would have proven that Petitioner did not make the phone call from his motel room to the home of the victim; during the trial, he admitted to his co-counsel and Petitioner's family that he had not obtained those records. Accordino Aff. ¶ 5(a) (App. 37a). Prior to trial, Mr. Lysaght had also stated that he had obtained records to prove that Petitioner did not leave the federal facility where he had been confined, FCI Butner, with a belt that was used to link him to the murder; Mr. Lysaght later changed his story, saying that he had successfully moved to have the belt excluded from evidence at the trial. Both versions were false, and the belt was admitted at trial. *Id.* ¶ 5(b), (c), (d), (e) (App. 37a). Mr. Lysaght had also informed Petitioner, his co-counsel, and others that his private investigator was serving subpoenas, including a subpoena on David Nieves, as the trial progressed; but when co-counsel contacted the private investigator, the latter was not aware the trial had started and had not spoken to Mr. Lysaght in months about Petitioner's case. Chruby Aff. ¶ 20 (App. 29a); Cooper Aff. ¶ 13 (App. 34a).

In fact, Mr. Lysaght prepared no defense. He subpoenaed no witnesses. Cooper Aff. ¶ 10 (App. 33a). He obtained no evidence in support of Petitioner's timeline defense. Accordino Aff. ¶ 7 (App. 38a). In the end, Petitioner's co-counsel did their "best to assemble some sort of defense," but "were unable to do this in an effective manner and were left with presenting the type of evidence appropriate for a penalty phase." Cooper Aff. ¶ 15 (App. 34a). In addition, a forensic pathologist testified that, although he would have expected hairs and fibers from Ruth Fergus' attacker to be located at the scene, none of Petitioner's hairs nor fibers from his clothes were found there. Tr. of Trial at 32 (June 25, 1997).

Petitioner could retain new counsel or co-counsel could prepare the defense. The judge denied this request, and Petitioner was required either to proceed pro se or without lead counsel. Cooper Aff. ¶¶ 11, 12 (App. 33a-34a).

On June 25, 1997, the jury convicted Petitioner of First Degree Murder, Robbery, Burglary, Criminal Trespass, Theft, and a credit card violation. He was sentenced to life imprisonment and additional time on the remaining counts. App. 13a.

2. Petitioner noted an appeal to the Superior Court of Pennsylvania on December 29, 1997. In that appeal, he presented four issues, including

> (1) whether trial counsel was ineffective in failing to investigate an alibi defense; (2) whether trial counsel's statements to the jury in his opening that [Petitioner] would testify and then the subsequent failure of [Petitioner] to testify amounts to ineffective assistance of counsel; (3) whether [Petitioner's] parole officer acted as an agent of the state and, thus, was required to give [Petitioner] his *Miranda* rights prior to questioning him regarding the murder; and (4) whether the Commonwealth committed prosecutorial misconduct in stating that a stain on defendant's sock was the blood of the victim, who was crying out from the grave for the jury to find him guilty. [App. 14a (footnote omitted).]

On March 9, 1999, the Superior Court denied Petitioner's appeal. See *Commonwealth* v. *Chruby*, 737 A.2d 1270 (Pa. Super. Ct. 1999) (unpublished table decision). On April 4, 1999, Petitioner filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania; he amended that petition on April 7, 1999. The Supreme Court denied his petition on July 15, 1999. See *Commonwealth* v. *Chruby*, 740 A.2d 1144 (Pa. 1999) (unpublished table decision).

3. On July 13, 2000, Petitioner filed his petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania. In that petition, he challenged the state court's ruling with respect to the statements made to his parole officer and his counsel's ineffectiveness. The district

court ruled that both claims had been exhausted. App. 14a, 18a.

As it was required to do, the court reviewed Petitioner's petition under the standard set forth in AEDPA, 28 U.S.C. § 2254(d), which precludes federal habeas relief of claims adjudicated on the merits in state court "unless the adjudication of the claim involved an unreasonable determination of the facts in light of the evidence presented or 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'" App. 18a (quoting 28 U.S.C. § 2254(d)(1)).

The court first rejected Petitioner's claim that under the circumstances presented here, Officer Fox should have given Petitioner *Miranda* warnings prior to questioning him on matters related to Ruth Fergus' murder. Relying on this Court's decision in *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), the court held that a parolee being interviewed by a parole officer is not entitled to *Miranda* warnings unless that parolee is subject to formal arrest or restraint on freedom of movement. App. 20a. The court found that "this conclusion was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." *Id.* The court considered irrelevant the fact that the police had scripted the interview. *Id.* In addition, the court found that Petitioner was arrested before the police officers knew how he had answered the questions put to him by Officer Fox. *Id.* at 21a. Thus, the court held in the alternative, that the car key and parking stub were "not found as a result of unlawfully obtained statements but were discovered during a search conducted pursuant to a lawful arrest." *Id.*

The court then rejected Petitioner's ineffective assistance claim. The court acknowledged that counsel had promised the jury that Petitioner would testify and then did not call him to the stand. Applying this Court's test in *Strickland* v.

Washington, 466 U.S. 668, 687 (1984), the court held that counsel was not ineffective "because there was no evidence that counsel interfered with Defendant's right to testify." App. 21a-22a. In addition, the court decided that "there was no prejudice because the trial court instructed the jury that [Petitioner] had a constitutional right not to testify." *Id.* The court acknowledged Petitioner's testimony in connection with post-sentence motions that his counsel had convinced him not to testify by telling him "that 'if [he] took the stand, [he] was going to get the needle'" and what is more, that his lawyer had entirely failed to prepare Petitioner to testify. *Id.* (alterations in original). The court decided that even if this evidence were accepted, counsel had not interfered with Petitioner's right to testify. *Id.* at 23a. Finally, the court stated that Petitioner had not demonstrated that he was prejudiced by his counsel's conduct. *Id.*

Accordingly, on June 11, 2001, the court denied the petition for habeas corpus and found no basis to grant a certificate of appealability.

4. By order entered April 18, 2002, the Court of Appeals for the Third Circuit granted a certificate of appealability with respect to both issues raised in Petitioner's petition. After briefing and argument, however, the court of appeals affirmed the district court's decision denying the petition.

Applying the standard of review set forth in section 2254(d)(1), the court considered whether the state court's decision was "contrary to" or "an unreasonable application of" clearly established law determined by the Supreme Court. See *Williams* v. *Taylor*, 529 U.S. 362, 391 (2000). The court first held that under *Minnesota* v. *Murphy*, "a probationer must timely assert his Fifth Amendment privilege when questioned by his probation officer if the probationer's privilege is to be preserved" unless the probationer is in custody. App. 6a. The court decided that the record of the hearing on Petitioner's motion to suppress contained no evidence suggesting that he felt he was not free to leave and

that "even in light of [Petitioner's] testimony during a hearing on post-sentence motions, . . . a reasonable person in his circumstances would not feel that he was not free to leave." *Id.* at 7a-8a. In the alternative, the court held that "the officers would have discovered the car key and thereby the incriminating evidence in the car" pursuant to a valid search incident to arrest. *Id.* at 9a.

The court also rejected Petitioner's ineffective assistance claim, applying the *Strickland* test. The court acknowledged that:

> [t]he troubling aspect of trial counsel's performance is that he delivered an opening statement after the close of the prosecution's case. At that point he had heard the evidence against his client and was in a good position to determine whether or not to call him to the stand. Moreover, if he was unsure at that point whether [Petitioner] should testify, he probably should not have promised the jury that [Petitioner] would take the stand in his defense. [App. 9a-10a.]

The court "[a]ssum[ed] that [Petitioner] ha[d] shown that counsel's errors were 'professionally unreasonable,'" but held that he had not been prejudiced by those errors in light of "the strength of the Commonwealth's case." *Id.* at 10a, 11a. The court did not address whether counsel's errors should have been presumed to result in prejudice. Moreover, in addressing prejudice, the court considered only the Commonwealth's case, and failed to consider the evidence that would have been presented if counsel's errors had not occurred.

5. Petitioner sought rehearing en banc which was denied January 13, 2003. This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. PREJUDICE SHOULD BE PRESUMED BASED ON COUNSEL'S DEFICIENT PERFORMANCE; AT THE VERY LEAST, THE CONCLUSION THAT PETITIONER WAS NOT PREJUDICED IS BASED ON AN ERROR OF LAW.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. That right is "fundamental to our system of justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Indeed, "[t]he right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685.

In *Strickland*, this Court announced a two-part test to govern ineffective assistance of counsel claims alleging attorney error. First, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant must show that "the deficient performance prejudiced the defense," in the sense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687, 694. Although the possibility of a different outcome must be substantial to establish prejudice, it may be less than 50 percent. *Id.* at 693. See *id.* at 694 (a "reasonable probability" is less than a preponderance; "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome").

In certain carefully defined contexts, however, the Court does not require that prejudice be demonstrated. Instead, the

Court presumes prejudice if a defendant is completely denied the presence of counsel at a critical stage of the proceedings, if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or if circumstances would render a competent lawyer unable to render effective assistance (*e.g.*, in a conflict of interest). See *United States* v. *Cronic*, 466 U.S. 648, 659 (1984); *Bell* v. *Cone*, 122 S. Ct. 1843, 1851 (2002).

The *Strickland* principles described above are "'clearly established'" for purposes of review under AEDPA and section 2254(d). See *Williams*, 529 U.S. at 391. In this case, the lower courts applied this Court's legal framework for assessing claimed violations of the Sixth Amendment right to counsel in a way that contradicts these clearly established principles and reaches a result contrary to that mandated by controlling Supreme Court precedent. *Id.* at 405-06. Accordingly, this Court should grant the petition to eliminate the conflict between this case and its own decisions and to resolve the important legal issues about prejudice that arise in this case.

A. A Presumption of Prejudice Arises From Counsel's Deficient Performance.

As set forth above, the performance of Mr. Lysaght – Petitioner's counsel – was remarkably deficient in a number of respects. Most striking, however, was his broken promise to the jury that Petitioner would testify and offer an explanation of his whereabouts at the time of the murder. He made this testimony "the centerpiece of the defense" and "announce[d] that fact to the jury in his opening statement" and then apparently decided that petitioner should not testify. *Ouber* v. *Guarino*, 293 F.3d 19, 27 (1st Cir. 2002). Prior to this Court's decision in *Bell* v. *Cone*, the courts of appeals had unanimously concluded that this breed of misconduct was so inherently prejudicial that prejudice should be presumed. Since *Bell* v. *Cone* was decided, however, the First and Third Circuits have erroneously concluded that a broken promise of

the defendant's testimony is not inherently prejudicial. This interpretation of *Bell* v. *Cone* is incorrect and warrants certiorari review.

As set forth above, Petitioner's counsel delivered a delayed opening statement – that is, a statement *after* the Commonwealth had put on its direct case. Accordingly, at that point, counsel was fully cognizant of the strength of the Commonwealth's case and, indeed, precisely what that evidence would and would not show. In that delayed opening statement, Mr. Lysaght promised no less than four times that Petitioner would testify on his own behalf and that he would explain his whereabouts at the time of the murder. Mr. Lysaght then not only failed to call Petitioner as a witness, but threatened him in order to prevent that testimony stating that Petitioner would "get the needle" if he testified. Mr. Lysaght offered no strategic explanation for his decisions.[3]

There can be none. The courts of appeals have concluded that in these circumstances, there is no conceivable strategic justification for this sequence of decisions. This performance was plainly deficient:

> Taken alone, each of these decisions [announcing to the jury that the defendant would testify and later advising the defendant not to testify] may have fallen within the broad universe of acceptable professional judgments. Taken together, however, they are indefensible. Neither the state court nor the Commonwealth has managed to identify any benefit to be derived from such a decisional sequence, and we are unable to see the combination as

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[3] At the post-trial hearing, Mr. Lysaght belatedly suggested an ethical concern with Petitioner's testimony, but no lower court accepted this suggestion which was simply a post hoc attempt to justify counsel's abysmally deficient performance. Petitioner, his brother-in-law, and Mr. Lysaght's co-counsel each testified that Mr. Lysaght never expressed any ethical concerns to Petitioner or to them about Petitioner's intended testimony. Chruby Aff. ¶¶ 26-27 (App. 30a); Accordino Aff. ¶¶ 14-15 (App. 39a); Cooper Aff. ¶ 24 (App. 35a).

> part and parcel of a reasoned strategy. We therefore conclude that, in the absence of unforeseeable events forcing a change in strategy, the sequence constituted an error in professional judgment. [*Ouber*, 293 F.3d at 27.]

Prior to this Court's decision in *Bell* v. *Cone*, this analysis would have been the end of the matter. The courts would have held that Mr. Lysaght's conduct was so inherently prejudicial that no inquiry was necessary, and concluded that he was ineffective under *Strickland*. That was the conclusion of the First and Third Circuit when they addressed this question in virtually identical circumstances. See *Anderson* v. *Butler*, 858 F.2d 16 (1st Cir. 1988) (holding that counsel was ineffective for promising the jury during an opening statement that he would present certain testimony and then failing to call the witnesses specified although they were available); *McAleese* v. *Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel").

Both of these courts of appeals have now incorrectly interpreted *Bell* v. *Cone* to require a prejudice inquiry even when counsel promises the jury that the defendant will testify and then reneges on that promise. See *Ouber*, 293 F.3d at 33 (rejecting *Anderson* and holding that "the circumstances of this case do not fall within the contours of any of the three recognized exceptions to the *Strickland* formulation, a presumption of prejudice cannot be condoned"); App. 10a-11a (applying prejudice analysis). This is an erroneous overeading of this Court's decision.

This Court has long recognized the unique importance of a criminal defendant's testimony. See, *e.g.*, *Green* v. *United States*, 365 U.S. 301, 304 (1961) ("[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself"); *Ouber*, 293 F.3d at 28 (a "defendant has the right to testify in

[his] own defense, and, when such testimony is proffered, the impact on the jury can hardly be overestimated"). Indeed:

> When a jury is promised that it will hear the defendant's story from the defendant's own lips, and the defendant then reneges, *common sense suggests that the course of the trial may be profoundly altered*. A broken promise of this magnitude taints both the lawyer who vouchsafed it and the client on whose behalf it was made. [*Id.* (emphasis supplied).]

The question whether the court should presume prejudice "turns on the magnitude of the deprivation of the right to effective assistance of counsel." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 482 (2000). The error that occurred here is monumental; it is virtually impossible to imagine any circumstance involving a delayed opening statement in which a defendant would not be prejudiced by his or her counsel's decision repeatedly to promise that his or her client would testify and then to renege on that promise. There is no possibility in such circumstances that the decision was a strategic response to the government's case; the only possible conclusion that the jury can draw is that the *defendant's counsel cannot be trusted and therefore that the entirety of the defense is untrustworthy*. As a result, this is one of those "circumstances that [is] so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified." *Chronic*, 466 U.S. at 658. Put differently, the courts should not accord a "presumption of reliability" to judicial proceedings in which counsel has so clearly demonstrated that he is not reliable. See *Smith* v. *Robbins*, 528 U.S. 259, 286 (2000).

Equally to the point, in the circumstances presented here, petitioner was effectively denied counsel with respect to an opening statement, a "critical stage of the proceeding[s]." *Cronic*, 466 U.S. at 659 n.25. See also *Hunter* v. *Moore*, 304 F.3d 1066, 1070-71 (11th Cir. 2002) (closing argument is a "'critical stage'" of a trial). An opening that consists of

broken promises concerning a defense that will never come to pass cannot be considered an opening by competent counsel. This aspect of the deficient opening by itself requires that prejudice be presumed and therefore that ineffective assistance be found.

Moreover, here the broken promise is not the only aspect of Mr. Lysaght's deficient conduct exhibited in the opening statement from which prejudice should be presumed. In addition, in the delayed opening, Mr. Lysaght also stated that Petitioner had committed crimes that Petitioner denied that he had committed. This conduct is clearly deficient as a matter of law. *United States* v. *Holman*, 314 F.3d 837, 843 (7th Cir. 2002) ("an attorney's concession of a client's guilt without any indication of the client's consent to the strategy is deficient conduct for *Strickland* purposes"); *United States ex rel. Ross* v. *Franzen*, 668 F.2d 933, 938 (7th Cir. 1982) (stipulating to facts that prove guilt is deficient performance); but see *Haynes* v. *Cain*, 298 F.3d 375 (5th Cir.) (en banc), *cert. denied*, 123 S. Ct. 676 (2002). Nor can it be denied that a concession that a client is guilty of a crime deprives the client of any defense with respect to the crime at issue. Again, this opening was deficient and prejudice must be presumed.

Finally, the record is clear that Mr. Lysaght had prepared no defense whatsoever and utterly failed to put on the defense that he and Petitioner had agreed upon – an alibi/timeline defense, including an acknowledgement of Petitioner's connection to the victim's car, articulated by Petitioner's testimony and supported by evidence related to phone records and the belt that would buttress his version of events, as well as by testimony concerning another individual emerging from the motel room used by Petitioner and leaving the premises in a white car. See *supra* at 5, 8. See *Williams* v. *Taylor*, 529 U.S. 362 (2000); *Kimmelman* v. *Morrison*, 477 U.S. 365, 385-86 (1986) (counsel's failure to conduct pretrial discovery and failure timely to file suppression motion was prejudicial

because unreasonable and below prevailing professional norms). Cf., *e.g.*, *Pavel* v. *Hollins*, 261 F.3d 210, 216-26 (2d Cir. 2001) (counsel's failure to prepare a defense, call important fact witnesses and call medical expert amounted to deficient performance). In these circumstances – where the defense agreed upon by lawyer and client was not made – the prosecution's case simply was never subjected to meaningful adversarial testing. For this reason, too, prejudice should have been presumed from Mr. Lysaght's deficient conduct.

This Court should grant the petition for certiorari to address the important question whether prejudice should be presumed when counsel falsely promises in a delayed opening that a defendant will testify and whether prejudice should, at the very least, have been presumed under the totality of circumstances presented in this case.

B. The Court Of Appeals Applied The Wrong Standard In Assessing Whether Petitioner Was Prejudiced By His Counsel's Deficient Performance.

Assuming that Petitioner had to show that he was prejudiced by his counsel's profoundly deficient performance, the lower court's conclusion that he was not prejudiced rests on clear legal error and cannot stand. In deciding whether a defendant was prejudiced by counsel's deficiencies, this Court has made it clear that a court is to consider not simply the course of the proceeding that actually occurred, but to assess *what would have occurred had counsel's performance been adequate*. See *Strickland*, 466 U.S. at 693-94 (the question is whether there is a strong possibility that counsel's deficient performance affected the outcome of the trial). That is also the rule in other courts of appeals. See, *e.g.*, *Ouber*, 293 F.3d at 33 (assessing whether "the trial might have ended differently absent the lawyer's blunder" and explaining that this is "normally a difficult endeavor"). Here, however, the court of appeals assessed only the evidence actually admitted at trial and utterly failed to determine whether there is a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

Here, the Third Circuit related in detail the evidence that the Commonwealth presented against Petitioner. The court concluded that this evidence was strong and therefore that Petitioner had not been prejudiced by his counsel's deficient performance. App. 10a-11a. The apparent strength of the wholly circumstantial case against Petitioner, however, is directly attributable to trial counsel's numerous failures.

First, and most notable, is the absence of Petitioner's promised testimony. Had he testified, he would have explained his whereabouts on the day of the murder, his discovery of the car some distance from the victim's home, and the desperate need for transportation which resulted in his taking an apparently abandoned vehicle. This alternative explanation for his possession of the car was never heard by the jury because, after developing a trial strategy that apparently rested solely on Petitioner's testimony, Mr. Lysaght did not present that testimony. The court of appeals simply did not consider whether the jury was likely to remember Mr. Lysaght's promise of Petitioner's testimony, the substance of Petitioner's intended testimony, and the nature of the inference that the jury drew from Petitioner's failure to testify, in light of counsel's promise. Here, as in *Ouber*, "[t]he attorney made the promises explicitly and repeatedly" and there can be no doubt that the jury was anticipating Petitioner's testimony. 293 F.3d at 34. Plainly, the court should have conducted this analysis under this Court's jurisprudence, and it was prejudicial to Petitioner not to have his alternative version of events presented to the jury, particularly when counsel had promised to provide it. Cf. *id.* ("the jury never had an opportunity to assess the conflicting testimony"). As the *Ouber* court concluded, "[b]ecause the error was egregious, we are fully persuaded that, but for its commission, a different outcome might well have eventuated").

Second, Mr. Lysaght's opening statement was also defective in its substance. Relevant here, Mr. Lysaght informed the jury that Petitioner had committed credit card crimes and that Petitioner had used the victim's credit card. As Mr. Lysaght knew, this statement contradicted Petitioner's intended testimony, placing him in the position of contradicting his attorney or testifying falsely. Chruby Aff. ¶ 15 (App. 29a). As set forth *supra* at 18, counsel's concession of guilt without his client's consent was deficient. Counsel's defective performance prevented Petitioner's testimony from being heard by the jury. Equally to the point, Mr. Lysaght's statement that his client was guilty of crimes could not but be prejudicial to Petitioner, especially since it was not followed by any evidence or testimony from him that placed the admission in context or demonstrated why the statement that Petitioner was guilty of one crime showed that he was innocent of murder. Cf. *United States* v. *Tavares*, 100 F.3d 995, 998 (D.C. Cir. 1996) (when defendant concedes that a crime has occurred, but disputes his involvement in that crime, his testimony "'must be considered of prime importance'") (quoting *United States* v. *Walker*, 772 F.2d 1172, 1179 (5th Cir. 1985)).

Third, prior to trial, Mr. Lysaght confirmed unequivocally to Petitioner, his family, and co-counsel that he had obtained critical evidence and witnesses that would support Petitioner's testimony. After the delayed opening, Petitioner learned that Mr. Lysaght had utterly failed to prepare the timeline defense and failed to secure the necessary evidence and witnesses. Specifically, Mr. Lysaght said that he had obtained: (a) phone records demonstrating that Petitioner could not have made the phone call from his motel room to the home of the victim; and (b) records that would demonstrate that Petitioner did not have a belt of the sort alleged to link him to the murder. At some later point prior to the trial, counsel assured Petitioner's family that although he had not in fact obtained the relevant records concerning the

belt, he had filed a *motion in limine* to suppress the belt and that the motion had been granted. Accordino Aff. ¶ 5 (App. 37a). Once the defense portion of the case commenced, however, it became clear that counsel had prepared *no defense*. Not a single witness, including David Nieves, had been subpoenaed nor had a single piece of evidence been obtained. Chruby Aff. ¶ 21 (App. 29a-30a); Coopers Aff. ¶ 10 (App. 33a); Accordino Aff. ¶ 7 (App. 38a). Mr. Lysaght did not in fact obtain the phone records at issue. He had neither obtained the relevant records concerning the belt nor filed a *motion in limine* to suppress its admission. Accordino Aff. ¶ 5 (App. 37a). Had Mr. Lysaght obtained and presented this evidence, *i.e.*, in combination with Petitioner's testimony, would have left the jury with reasonable doubt about Petitioner's commission of the murder. Indeed, Mr. Lysaght's performance left Petitioner with the choice of going forward with his incompetent representation or of proceeding pro se (given the judge's denial of a continuance). This is no choice at all. Arguably, it was inherently prejudical to require Petitioner to proceed with this plainly incompetent counsel. Cf. *Crandell* v. *Bunnell*, 144 F.3d 1213, 1216 (9th Cir. 1998) (holding that it was unconstitutional to require a defendant to "be forced to choose between incompetent counsel and no counsel at all," especially in a capital case).

In sum, in assessing whether counsel's defective performance prejudiced Petitioner, the court of appeals erroneously considered only the proceedings that actually occurred, rather than the proceeding that would have occurred if counsel's performance had been competent. In that regard, it is critical to recall that the Commonwealth's case against Petitioner was wholly circumstantial. There was no evidence at the crime scene linking Petitioner to the crime, no fingerprints, hairs, or fibers – an absence rendered significant given the violent struggle that occurred between the victim and her attacker. Critically, moreover, Petitioner's testimony would have explained both his whereabouts that day and the

manner in which he came into possession of the victim's vehicle. See Chruby Aff. ¶ 28 (App. 31a) ("I did not murder Ruth Fergus. . . . I was in possession of the Fergus vehicle but I only took it when I found it far from the victims home."). It was counsel's defective performance that resulted in the absence from the trial of this testimony, as well as with other evidence calling into question the links between Petitioner and the murder.

This is not simply a matter of omission, however. In addition to the absence of this evidence, the jury heard Petitioner's counsel both promise that Petitioner would testify and concede that Petitioner committed a crime. Cf. *Ouber*, 293 F.3d at 34 (counsel's broken promise also undermined his standing with the jury, further diminishing defendant's chances of success). It was plainly unreasonable for the lower courts to conclude that these omissions and grievous errors did not prejudice Petitioner. "[T]here is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

II. THE COURT SHOULD GRANT THE PETITION TO DECIDE WHETHER THE LOWER COURTS HAVE UNREASONABLY EXTENDED *MINNESOTA* v. *MURPHY* AND AUTHORIZED DELIBERATE CIRCUMVENTION OF *MIRANDA*.

In AEDPA review, a state court decision is an "'unreasonable application'" of this Court's precedent if the state court "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply." *Williams*, 529 U.S. at 407 (O'Connor, J.). In this case, the court of appeals unreasonably extended *Minnesota* v. *Murphy*, 465 U.S. 420 (1984), to situations in which the parole officer acts as a front for the police so that they can conduct a custodial interrogation without giving a parolee *Miranda* warnings.

In *Minnesota* v. *Murphy*, a parole officer, *acting on her own*, questioned a parolee about possible criminal activity during a routine probation interview. This Court held that in these circumstances, a parole officer is not required to give a parolee *Miranda* warnings before such questioning. Specifically, the Court reasoned that the parolee was not in custody within the meaning of *Miranda* because, *inter alia*, he was familiar with the setting and thus not subject to "psychological intimidation" and because he was in fact free to leave at the end of the probation meeting.

Here, relying on *Minnesota* v. *Murphy*, the court of appeals held that police who wish to interrogate a suspect with an outstanding arrest warrant may freely circumvent any parolee's right to the *Miranda* warnings. They need only recruit the parole officer, provide him with the questions necessary to conduct the interrogation, and wait nearby to make the arrest *after* the results of the un-*Mirandized* interrogation are obtained. This holding unreasonably extends *Minnesota* v. *Murphy* far beyond its intended scope, encouraging the police to use a suspect's parole officer as a stalking horse and to delay formal arrest until the un-*Mirandized* questioning can take place. When this Court decided *Minnesota* v. *Murphy*, plainly it did not intend to encourage this deliberate circumvention of the *Miranda* rights of parolees.

First, and most clearly, *Minnesota* v. *Murphy* reserves the question whether a parole officer must advise a parolee of his or her *Miranda* rights when the parole officer has in fact been engaged as an agent of the police to participate in an ongoing criminal investigation:

> A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would

> incriminate him in a pending or later criminal prosecution. [465 U.S. at 435.]

Indeed in *Howard* v. *Moore*, 131 F.3d 399, 412 n.13 (4th Cir. 1997), the Fourth Circuit explained that "[i]t is unclear from the Court's analysis [in *Minnesota* v. *Murphy*] whether it considered the probation officer, whose admitted primary purpose for arranging the interview was to obtain incriminating statements from her probationer, to be acting as an agent of the police." Put differently, this Court has never held – as the Third Circuit did here – that a probation officer may act as a stalking horse or agent for the police and interrogate a parolee about to be arrested so that the police can dispense with any need to give *Miranda* warnings.

It is undisputed that in sharp contrast to the usual role of a parole officer, Officer Fox, in questioning Petitioner, was acting as an agent for the police. See *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357, 368 (1998) ("in contrast to police officers, [parole officers] are not 'engaged in the often competitive enterprise of ferreting out crime'"). Moreover, courts of appeals that have addressed the question agree that probation officers performing their routine duties are not engaged in custodial interrogation requiring *Miranda* warnings, but suggest that the result would be different where, as here, the probation officer is acting as the agent of police. See, *e.g.*, *Howard* v. *Moore*, 131 F.3d at 412 n.13 (holding that "absent evidence that [the parole officer] stepped outside his neutral role as a federal probation officer, we question the dissent's assumption that [the parole officer] acted as an agent of police"); *Williams* v. *Chrans*, 945 F.2d 926, 951 (7th Cir. 1991) (explaining that a parole officer is generally "'a neutral information gatherer for the court rather than [an agent of] the police or prosecution'") (quoting *United States* v. *Cortes*, 922 F.2d 123, 127 (2d Cir. 1990)); *United States* v. *Rogers*, 921 F.2d 975, 979 (10th Cir. 1990) (concluding that "[t]he purpose of the presentence report . . . is neither prosecutorial nor punitive. . . . [as t]he probation

officer acts as an agent of the court for the purpose of gathering and classifying information"); *United States* v. *Jackson*, 886 F.2d 838, 842 n.4 (7th Cir. 1989) ("we do not believe that a federal probation officer acts on behalf of the prosecution").

In this case, however, Parole Officer Fox was acting solely at the behest of the police. Specifically, at their request, he interrogated Petitioner about matters related to an ongoing murder investigation in which Petitioner was a suspect, using questions that the police directed him to ask. Officer Fox was also aware that the police were using a warrant in a $17 bad-check case – a warrant that had existed all through the period of Petitioner's recent incarceration – as a ruse or tool to investigate a wholly unrelated murder. While he was interrogating Petitioner, Officer Fox thus knew that the police had an outstanding warrant for his arrest; that they were on the premises to arrest him after their agent (Officer Fox) interrogated him; and therefore that Petitioner was in fact in custody, unable freely to leave. Aware of their obligation not to interrogate Petitioner without giving him his *Miranda* rights, the police deliberately recruited an agent to act and delayed their arrest in order to circumvent *Miranda*'s requirements.

It is plainly unreasonable to extend *Minnesota* v. *Murphy* to situations such as that presented here, where the police intentionally violate *Miranda* to procure evidence from a suspect in a murder investigation. In a directly analogous context, the law is clear that an otherwise permissible probation search may be held invalid if it is merely a cover for illegal police activity. A probation officer's "exercise of th[e] authority [for a warrantless search] should not be upheld when it appears that the probation or parole officer 'was nothing more than the agent, tool, or device of' the police." Cf. 4 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.10(e), at 794 (3d ed. 1996) (quoting *United States* v. *Hallman*, 365 F.2d 289, 292 (3d Cir.

1966)). Similarly here, an otherwise permissible interview by a probation officer is unlawful if it is merely a cover for an illegal police interrogation. In the interrogation context, too, the probation officer should not be permitted to act as a cat's paw so that the police can evade the Constitution's requirements.[4]

One of the purposes of *Miranda* is "to ensure that the police do not coerce or trick captive suspects into confessing." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 (1984) (emphasis omitted) (footnote omitted) (citing *Rhode Island* v. *Innis*, 446

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[4] In the alternative, under this Court's decisions, it was unreasonable for the lower courts to conclude that Petitioner was not in custody for purposes of the application of *Miranda*. Under clearly established Supreme Court law, the issue is whether a reasonable person in Petitioner's position would have understood that he was free to leave. *See Stansbury* v. *California*, 511 U.S. 318, 324 (1994) (per curiam). Here, although it is undisputed that Petitioner was in fact *not* free to leave, the lower courts held that a reasonable person in Petitioner's position would have believed that he was free to go. The evidence presented makes clear that this conclusion was unreasonable as a matter of law. This was not a routine meeting between a parole officer and a parolee. Petitioner was required to attend the meeting, and the parole officer certainly never informed him that he was free to leave or that he had a right to remain silent. Petitioner was aware that there were police in the building and that they had been speaking with Officer Fox; moreover, prior to the meeting with Officer Fox, he had been frisked and photographed (not usual practices for interviews with a parole officer). *See supra* at 4. In addition, Petitioner was informed during the interview that there was an outstanding warrant for his arrest on a bad check charge. Finally, Petitioner was arrested promptly at the end of the meeting. These factors, in combination, show that it was unreasonable for the lower courts to conclude that, as the parole interview developed, Petitioner believed that he was free to go. Any reasonable person in Petitioner's situation would have understood based on the police presence and Officer Fox's questions that he was the focus of an investigation and effectively in custody. *Cf. Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984) (although a traffic stop in not inherently a custodial situation, "[i]f a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*").

U.S. 291, 299, 301 (1980), *Miranda*, 384 U.S. at 445-58). The ramifications of the decision below are deeply disturbing, because it permits a proliferation of police department policies encouraging police officers to conduct interrogations of paroled suspects through parole officers, circumventing the need to provide *Miranda* warnings. The petition for certiorari should be granted to address the important question raised about the legality of this tactic.[5]

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 19, 2002

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[5] The court of appeals held that even if Petitioner's statements should have been suppressed as the fruit of a *Miranda* violation, *compare Dickerson* v. *United States*, 530 U.S. 428, 444 (2000), *United States* v. *Patane*, 304 F.3d 1013, 1019 (10th Cir. 2002), *and United States* v. *Faulkingham*, 295 F.3d 85, 90-94 (1st Cir. 2002), *with United States* v. *Sterling*, 283 F.3d 216, 218-19 (4th Cir. 2002), the police would nonetheless have discovered the car key and parking ticket and hence the victim's car and associated evidence. This turns on whether the police would have arrested Petitioner once he answered questions following *Miranda* warnings, a question that the lower courts could not have decided. This issue should be the subject of a new trial if the court of appeals is reversed and the matter is remanded.